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No. 90-913

In the Supreme Court of the United States

OCTOBER TERM, 1990

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM OF THE UNITED STATES OF AMERICA, PETITIONER

v.

MCORP FINANCIAL, INC., ET AL.

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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In this case, the court of appeals held that the Federal Reserve Board "exceeded its statutory authority" in promulgating and enforcing its source of strength regulations with respect to bank holding companies. Pet. App. 2a. In our petition, we demonstrated that the court of appeals has erroneously invalidated a longstanding, frequently invoked, and critically important federal regulatory tool for safeguarding the stability of the Nation's banking institutions. Moreover, we showed that the court of appeals effectively reached out to nullify the Board's policy by misappropriating jurisdiction under the doctrine set forth in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). The court did so despite FISA's explicit preclusion provision, namely, that "no court shall have jurisdiction to affect * * * any notice or order" issued under FISA "except as otherwise provided in [12 U.S.C. 1818]." 12 U.S.C. 1818(i)(1). In response, MCorp seeks to minimize both the importance of the substantial issues presented and the waywardness of the court of appeals' decision. MCorp's efforts fall short of the mark.

1. MCorp asserts (Br. in Opp. 4, 11-13) that the FDIC's newly minted authority under the "cross-guaranty" provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1815(e), renders the Board's source of strength authority unimportant to the Nation's banking system. MCorp is wrong. First, the Board's authority includes the power to require holding companies to use all their available assets – including those derived from *nonbank* affiliates – to support weakened bank subsidiaries. The FDIC, however, can reach only assets of other banking subsidiaries. And that power has marginal utility where, as here, most of the holding company's banking subsidiaries are already strapped.[1]

Second, the Board, unlike the FDIC, can take remedial measures utilizing bank holding company assets before a bank default takes place. The Board's source of strength policy, unlike the FDIC's authority, is not confined to mitigating losses that have already occurred. Rather, the Board may apply its policy to prevent bank insolvencies by compelling holding companies to use their assets to protect the capital adequacy of subsidiary banks.[2]

[1] In this case, 20 of MCorp's 25 subsidiary banks were declared insolvent, and three of the five remaining open banks already had capital reserves below minimum regulatory requirements.

Indeed, in the recent collapse of another large bank holding company system, the Bank of New England, all of the holding company's subsidiary banks were declared insolvent and placed under the FDIC's receivership. In such circumstances, the FDIC's cross-guaranty authority under FIRREA has little practical significance in preventing the failure of such banks.

[2] MCorp asserts (Br. in Opp. 14-15) that recent proposals before Congress to clarify the Board's source of strength authority show that the validity of such authority does not warrant this Court's review. To the extent Congress does consider such proposals, such legislative activity – in the face of the recently enacted provisions of FIRREA – would confirm that the Board's authority is anything but the sort of inconsequential issue to the Nation's banking system MCorp suggests.

In addition, MCorp seeks to belittle the Board's source of strength regulations by asserting that the Board "did not 'discover' its purported source-of-strength authority until [1987]." Br. in Opp. 20. As we previously pointed out (Pet. 15 & n.13), the Board has long relied on such authority in undertaking negotiations and other informal supervisory actions calculated to obtain a holding company's cooperation in ensuring that banking subsidiaries remain adequately capitalized.

2. MCorp's defense of the court of appeals' invocation of jurisdiction under *Leedom* v. *Kyne*, in the face of the exclusive judicial review provisions of FISA, 12 U.S.C. 1818(i), amounts to nothing more than labelling the Board's proceedings "*ultra vires* action." Br. in Opp. 26. Such a conclusory position, however, cannot be squared with this Court's recognition that "the painstakingly delineated boundaries of *Kyne*" make the "*Kyne* exception [to statutory judicial review provisions] * * * a narrow one." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); see *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 660 (1965).

Moreover, the court of appeals acknowledged (Pet. App. 21a-22a) that the Board's authority to promulgate and enforce its source of strength regulations ultimately turned on application of the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The very existence of such an issue under *Chevron* presupposes that Congress has not spoken to the precise question at hand, and that the agency therefore has the jurisdiction and delegated authority to construe the meaning of the statutory provision. For that reason, the court of appeals' invocation of *Leedom* v. *Kyne* is indefensible.

As an alternative basis of jurisdiction, MCorp invokes the broad powers of appellate review set forth in 28 U.S.C.

2106. See Br. in Opp. 28-30. That provision, however, is not an independent source of jurisdiction. In any event, this Court has long held that "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934). Since FISA, 12 U.S.C. 1818(i), otherwise deprived the district court of jurisdiction to review the Board's pending proceedings, the power conferred on courts of appeals under 28 U.S.C. 2106 may not cure the district court's lack of subject matter jurisdiction.

MCorp's last-ditch effort to defend the court of appeals' exercise of jurisdiction is not a defense at all. MCorp merely asserts (Br. in Opp. 30 & n.72) that a pending action in another district could find its way to the court of appeals. Federal jurisdiction is determined by the particular circumstances of the case before the court, not by speculation as to whether similar issues might properly be presented by a different case pending in a different forum. And considerations of so-called "judicial economy," however laudable in other contexts, contrary to MCorp's suggestion, Br. in Opp. 29, may not be substituted for statutory prerequisites to jurisdiction.

3. MCorp's scattershot attack on the Board's authority to promulgate and enforce its source of strength regulations fails to come to grips with the language of the statutory provisions undergirding the Board's policy. See Pet. 23-29 (discussing provisions of the BHCA, FISA, and ILSA).[3] Instead, MCorp principally contends (Br. in Opp. 5-9) that the so-called "shareholder assessment" provisions of the National Banking Act, which Congress repealed over 30 years ago, show that Congress had no intention of conferring similar authority on the Board under the guise of source of strength regulations.

First, actions of the Congresses that repealed provisions of the National Bank Act have no bearing on this case, since those Congresses assuredly did not enact the statutory provisions at issue, namely, the pertinent aspects of the BHCA, FISA, and ILSA. Second, MCorp's equating the regulatory regimes of "shareholder assessment" and source of strength is a sleight of hand. Under the National Bank Act, shareholder assessments were to be collected only after the bank had failed, in order to reduce losses incurred by the bank's creditors.[4] The Board's source of strength policy, in stark contrast, is prophylactic. That policy seeks to prevent bank failures—and the resulting losses to depositors and other creditors—by requiring the bank's parent holding company to provide needed capital before the bank fails.

4. Finally, MCorp contends that the Board's source of strength policy "is void and unenforceable because it is a 'substantive rule' adopted in violation of the notice-and-comment requirements of section 553 of the APA, 5 U.S.C. § 553." Br. in Opp. 22-23. In asserting this argument before this Court, MCorp neglects to mention that such a claim was never presented to either the district court or the court of appeals. For that reason alone, MCorp's claim is not properly before the Court. *E.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 602-603 (1991); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, since the merits of MCorp's APA claim cannot be reviewed in the absence of an adequate record regarding the Board's enforcement

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[3] For example, MCorp tries to make much out of the FDIC's evident disagreement—as a matter of policy—with the Board's source of strength regulations. See Br. in Opp. 5-6, 9-16. Congress has vested the Federal Reserve Board, not the FDIC, with the authority to regulate bank holding companies.

[4] See Act of June 3, 1864, ch. 106, §§ 12, 50, 13 Stat. 102-103, 114-115; see also Act of Dec. 23, 1913, ch. 6, § 23, 38 Stat. 273.

efforts in this area, MCorp may not find a safe harbor in the Court's practice allowing a respondent to "rely upon any matter appearing in the record in support of the judgment below." *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); see *Schweiker* v. *Hogan*, 457 U.S. 569, 585 & n.24 (1982).

In any event, MCorp errs in branding the Board's source of strength policy as a substantive rule under the APA. The Board's policy did not in fact create new substantive obligations. Instead, the 1987 policy statement codified and clarified existing agency practices developed over the course of the Board's enforcement activities. See Pet. 15 & n.13.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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